CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946 47

No. 861 16

PRIEBE & SONS, INC., PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JANUARY 7, 1947.

CERTIORARI GRANTED MARCH 10, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 861

PRIEBE & SONS, INC., PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
Record from Court of Claims	1	1
History of proceedings	1	1
Amended petition	1	1
Exhibit "A"—Announcement FSC-553	13	8
Exhibit "B"—Plaintiff's telegraphic offer to sell	23	16
Exhibit "C"—Telegraphic amendment to plaintiff's offer to sell	24	16
Exhibit "D"—Telegraphic acceptance of offer to sell	25	17
General traverse	27	17
Argument and submission	27	17
Special findings of fact	29	18
Conclusion of law	44	32
Opinion, Littleton, J.	44	33
Dissenting opinion, Jones, J.	50	39
Judgment	53	40
Proceedings after entry of judgment	55	40
Clerk's certificate (omitted in printing)	57	
Order allowing certiorari	58	41

[fol. 1]

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. 45922

PRIEBE & SONS, INC., an Illinois Corporation,

vs.

THE UNITED STATES

HISTORY OF PROCEEDINGS

The original petition was filed July 28, 1943.

On March 1, 1944, on motion made therefore and allowed by the court, the plaintiff filed an amended petition which is as follows:

AMENDED PETITION—Filed March 1, 1944

To the Court of Claims of the United States, and to the Honorable, the Chief Justice and the Judges thereof:

The above-named plaintiff files this amended petition, with leave of this Court first obtained, and respectfully shows:

1. The plaintiff at all times hereinafter mentioned was and is a domestic corporation organized and existing under the laws of the State of Delaware, with its principal place of business in the City of Chicago and State of Illinois.

2. The jurisdiction of this Court is predicated upon the fact that the claim hereinafter set forth is founded upon a [fol. 2] contract entered into between the plaintiff and Federal Surplus Commodities Corporation, an agent and instrumentality of the United States duly authorized and acting for and in behalf of the United States. Federal Surplus Commodities Corporation will hereinafter be referred to as "FSCC," and is more specifically and particularly described in paragraph 3 of this petition.

3. Plaintiff avers that Federal Surplus Commodities Corporation (herein called "FSCC") was incorporated under the laws of Delaware on October 4, 1933, under the name of "Federal Surplus Relief Corporation," and was incorporated as a non-stock, non-profit, membership corporation; that its members were at that time the Secretary

of Agriculture, the Administrator of Federal Emergency Relief Administration, and the Administrator of the Public Works Administration, and that on November 18, 1935, the name of the corporation was changed to its present name, to-wit, "Federal Surplus Commodities Corporation," and thereupon its members were the Secretary of Agriculture, the Administrator of the Agricultural Adjustment Administration, and the Governor of the Farm Credit Administration; that in 1937, by an Act of Congress, the Federal Surplus Commodities Corporation was designated an agency of the Federal Government under the direction of the Secretary of Agriculture for a period of two years, and that by said Act the Secretary was authorized to transfer to FSCC the funds used for market improvement purposes provided [fol. 3] in Section 32, Public 320, such funds to be used in procuring commodities, and that in 1938, in connection with the enactment of general legislation in aid of agriculture, Congress extended the operations of FSCC until 1942, its general functions to remain the same; that by an Act of Congress on June 27, 1942, the Federal Surplus Commodities Corporation was continued as an agency of the United States under the direction of the Secretary of Agriculture until June 30, 1945, and plaintiff avers that when FSCC entered into the aforesaid contract it was duly authorized to do so by the United States, and that all of its subsequent actions thereunder were for and in behalf of the United States and duly authorized by the United States.

4. Previous to April 22, 1942, the Agricultural Marketing Administration, an agent and instrumentality of the United States duly authorized and acting for and in behalf of the United States, broadcast to the public, Announcement FSC-553 (hereinafter called "Announcement"), a copy of which is hereto attached and marked Exhibit "A." On the aforesaid date the plaintiff submitted to Agricultural Marketing Administration an offer to sell, in accordance with the terms of the Announcement, certain dried whole eggs. The plaintiff's offer was by wire, a copy of which is hereto attached and marked Exhibit "B." Said offer was amended in a slight detail by plaintiff on this same day by wire, a copy of which is hereto attached and marked Exhibit "C." The said offer was accepted by the Agricultural Marketing Ad- [fol. 4] ministration by wire on, to-wit, April 23, 1942. Said acceptance by wire is marked Exhibit "D" and at-

tached hereto. The aforesaid acceptance resulted in a contract between the plaintiff and Federal Surplus Commodities Corporation, and, as provided in the Announcement, the Announcement itself, the plaintiff's offer by wire, the amendment of plaintiff's offer, and Agricultural Marketing Administration's wire of acceptance, together constitute the written contract between the parties, that is, between the plaintiff and FSCC. Such contract was designated by FSCC "Contract FSC-22289."

5. Under the terms of the aforesaid contract the plaintiff contracted to sell, and FSCC contracted to buy, numerous lots of dried eggs for delivery at different times and f. o. b. various places, but for the purposes of this claim the issue can be confined to two lots of eggs included in the above contract, to-wit, 110,000 pounds f. o. b. Manning, Iowa, and 90,000 pounds f. o. b. Sleepy Eye, Minnesota, a total of 200,000 pounds. The sale price as specified in the contract for both lots was the same, namely $.93¾ per pound, and the first date for delivery as specified in the offer for both lots was the same, to-wit, May 18, 1942. However, with respect to delivery, FSCC had an option under paragraph 7 of the Announcement of taking delivery on any date within a ten-day period beginning May 18, 1942. As FSCC had the option to choose any particular day within the ten-day period for delivery, it was incumbent upon FSCC to notify the plaintiff of the particular delivery date and the amount to be shipped on such date and the destination of the shipment.

[fol. 5] 6. FSCC did give shipping instructions to the plaintiff for the entire 200,000 pounds of dried eggs. Such shipping instructions were given on FSCC's forms, which were marked Form FSC-1512 and entitled "Notice to Deliver." Under the terms of the contract FSCC could not require the delivery of any of the aforesaid 200,000 pounds of dried eggs previous to May 18, 1942, and moreover under the contract it was required to give shipping instructions with respect to all of said dried eggs before May 29, 1942. Nevertheless, FSCC gave shipping instructions for 54,945 pounds of dried eggs to be shipped from Manning, Iowa, previous to May 18, 1942, to-wit, May 15, 1942, and gave shipping instructions with respect to the remainder of the 200,000 pounds of dried eggs after May 18, 1942, and with respect to a substantial part of the said remainder after

May 28, 1942. The plaintiff shipped and delivered the eggs in all instances exactly in accordance with and at the times specified in FSCC's shipping instructions, and it has not been contended by FSCC or by any other department, bureau or officer of the United States, that the plaintiff failed to deliver any of the 200,000 pounds of eggs, nor that delivery was not in exact accordance with the shipping instructions, nor has it contended that the eggs delivered and reecived by FSCC failed in any respect to meet any of the terms or requirements of the aforesaid contract.

7. The 200,000 pounds of dried whole eggs having been delivered as aforesaid, payment became due under the con- [fol. 6] tract, but the auditor of FSCC, in connection with the issuance of Bureau Voucher No. 2378, issued a notice of suspension dated June 11, 1942, and undertook to assess liquidated damages under paragraph 9 of the Announcement against 117,364 pounds of the dried eggs at $.10 per pound for a total of $11,736.40, and deducted this sum from the payment then due to the plaintiff under the aforesaid contract. Attached to the suspension notice was a memorandum entitled "Memorandum—Bureau Voucher No. 2378," which reads as follows:

> "Contract FSC-22289 under the terms of Announcement FSC-553 provides for the delivery of Dried Whole Eggs for May 18, 1942 delivery as indicated in the offer dated April 22, 1942 and the offer accepted April 23, 1942.
>
> "Announcement FSC-553 paragraph No. 7, 'Delivery'—Dried Egg products accepted for delivery shall be ready for delivery on the date specified in the offer, or if an inspection by Agricultural Marketing Administration had been requested for a date at least ten (10) days prior to the date specified in the offer, and sampling and inspection services were not forthcoming.
>
> "Inspection Certificates covering various lots shipped under Contract FSC-22289 as listed below indicate the eggs were not ready for delivery on the dates specified above. Such late deliveries shall be subject to liquidated damages at ten (10c) per pound."

Following the above language, the memorandum contains in tabular form the following information: That the inspec- [fol. 7] tion certificates for 31,680 pounds of the eggs sold

f. o. b. Sleepy Eye, Minnesota, bore the date May 20, 1942 (which was two days after the first delivery date of May 18th as specified in the offer); that the inspection certificates covering another 31,680 pounds bore the date May 21st (which was three days after May 18th); that the inspection certificates covering 26,529 pounds bore the date May 22nd (which was four days after May 18th); and that the inspection certificates covering 27,475 pounds of the eggs delivered f. o. b. Manning, Iowa, bore the date May 20th (which was two days after May 18th); therefore a total of 117,364 pounds of the eggs delivered under Contract FSC-22289 bore inspection certificates dated subsequent to May 18, 1942.

Subsequent to the filing on July 28, 1943, of the original petition in this cause, the auditor of the Department of Agriculture, in connection with the audit of the plaintiff corporation's voucher No. 487, issued a notice of suspension dated January 5, 1944, and undertook to assess further liquidated damages under paragraph 9 of the Announcement against an additional 27,465 pounds of the dried eggs at $.10 per pound for a total of $2,746.50, and deducted this sum from a payment then due to the plaintiff. This notice of suspension stated that Contract FSC-22289 provided for the delivery of dried whole eggs on May 14, 1942 (a date erroneously used in place of the correct date May 18, 1942); that paragraph 7 of the Announcement indicated that failure to have the specified quantities of dried eggs inspected and ready for delivery on the date specified would [fol. 8] be cause for assessing liquidated damages at $.10 per pound; and that the inspection certificate for 27,465 pounds of the eggs sold f. o. b. Manning, Iowa, bore the date May 20, 1942 (which was two days after the first delivery date of May 18th abovementioned).

Paragraph 7 of the Announcement, upon which the auditors relied to invoke paragraph 9 of the Announcement, contained no provision which required that the particular and specific eggs which were ultimately delivered to FSCC should have been on hand inspected and ready for delivery on May 18, 1942, as the paraphrase of paragraph 7 in the auditors' statements mentioned above would indicate. The requirement with respect to delivery in paragraph 7 reads as follows:

"Save for the exception noted below, failure to have specified quantities of dried egg products in-

spected and ready for delivery by the date specified in the offer will be cause for invoking the provisions of Paragraph 9 below."

This paragraph 7 required, at most, that the plaintiff have on hand on May 18th and upon each of the succeeding ten days such quantity of dried egg products inspected and ready for delivery as FSCC would be entitled to demand upon each of those dates, the purpose and intent of paragraph 7 being that FSCC should not be delayed whenever it was ready to take delivery within the ten-day period specified in the contract. Paragraph 7 did not require that [fol. 9] the plaintiff have on hand the particular lot of dried egg products which were actually delivered to the FSCC upon issuance of its shipping instructions.

The plaintiff avers that it had on hand inspected and ready for delivery on May 18, 1942, and on each and every day thereafter until delivery of the entire 200,000 pounds of eggs had been made, a sufficient quantity of eggs to meet the delivery requirements of the aforesaid contract regardless of when shipping instructions were given, and that the terms of paragraph 7, and of all other provisions of the contract, were by the plaintiff fully observed.

8. Plaintiff further avers that the eggs were delivered in accordance with the FSCC's shipping instructions, that that the FSCC suffered no delay and sustained no damages, and that accordingly, irrespective of the construction to be given to paragraph 7, the action of the FSCC and of the Department of Agriculture in issuing the aforesaid suspensions and in withholding the aforesaid sums was wrongful and in violation of the contract.

9. Plaintiff further avers that if the actions of FSCC and of the Department of Agriculture in suspending and withholding from the plaintiff the above-mentioned sums of $11,736.40 and $2,746.50 were in accordance with the provisions of paragraph 9, then such paragraph 9 is a penalty and not a provision for the assessment of liquidated damages, and is therefore void and unenforceable.

10. Immediately upon receipt of the first of the aforesaid suspension notices, namely, the one dated June 11, 1942,

[fol. 10] plaintiff protested to FSCC against the action taken by it in issuing the suspension notice and in withholding the aforesaid sum of $11,736.40, but no part of the amount withheld was paid to plaintiff, and therefore plaintiff filed reclaim vouchers on, to-wit, November 21, 1942, for the aforesaid $11,736.40 with FSCC in accordance with the following provisions set forth in the aforesaid notice of suspension, to-wit:

> "Suspended items, considered allowable, may be reclaimed on a separate subsequent and similar voucher form. Reclaimed items must be supported by the original suspension notice, full itemization, and brief of evidence."

On January 16, 1943, the plaintiff's reclaim for the suspended amount of $11,736.40 was denied by FSCC.

11. Plaintiff avers that it has in every respect fully and completely performed the contract which it entered into with FSCC; and that FSCC and the Department of Agriculture have paid the full purchase price therefor except for the amount of $14,482.90 (the total of the two amounts, $11,736.40 and $2,746.50, previously described) which they have wrongfully withheld from plaintiff, and that the plaintiff is entitled to recover said sum, together with interest.

12. Plaintiff further avers that it is the sole owner of the above claim; that no assignment or transfer of the [fol. 11] same or any part thereof has been made; that plaintiff is justly entitled to the amount claimed from the United States after allowing all just credits and offsets; that plaintiff is a citizen of the United States and has at all times borne true allegiance to the Government of the United States, and has not in any way aided, abetted or given encouragement to rebellion against the Government of the United States, and that it believes the facts as stated in this petition to be true.

Wherefore, plaintiff prays judgment for such sum of money as may be justly due and owing it amounting to, to-wit, $14,482.90, and interest thereon as follows: on $11,736.40 thereof from, to-wit, June 11, 1942; and on $2,746.50 thereof from, to-wit, January 5, 1944. The plain-

tiff also prays for such further and other relief to which it may appear to be entitled.

Campbell, Clark & Miller, 38 North LaSalle Street, Chicago, Illinois, Counsel for Plaintiff.

Of Counsel: Morris, KixMiller & Baar, Washington, D. C.; J. Arthur Miller, Chicago, Illinois; Allen H. Gardner, Washington, D. C.

[fol. 12] *Duly sworn to by Allen H. Gardner. Jurat omitted in printing.*

[fol. 13] EXHIBIT A TO AMENDED PETITION

United States Department of Agriculture
Agricultural Marketing Administration
Washington, D. C.

April 14, 1942.

Announcement FSC-553
Purchase of Dried Egg Products
(Supersedes Announcement FSC-450)

The Agricultural Marketing Administration announces that it will receive and consider offers for the sale of the following dried egg products, which may for convenience be referred to by their identifying letters:

Product A. Spray dried whole egg.

Product B. Separately packed dried albumen and dried yolk in the proportions of 1 lb. of dried albumen to 2.5 lbs. of dried yolk.

Product C. Dried albumen.

Offers submitted pursuant to this announcement will be accepted by, and after acceptance will become contracts with, the Federal Surplus Commodities Corporation.

How to Submit an Offer

Offers may be submitted by letter or telegram to the Purchase Branch, Agricultural Marketing Administration, United States Department of Agriculture, Washington, D. C., and must state the following:

a. That the offer is made subject to the terms of Announcement FSC-553.

[fol. 14] b. The number of pounds of each dried egg product offered at each delivery point.

c. The beginning date of the delivery period during which the vendor agrees to make delivery. (N.B. Par. 7.—*Delivery.*)

d. Price in cents per pound for each dried egg product, f.o.b. cars, trucks, or warehouses at each delivery point.

e. Name of originating carrier(s) at each delivery point.

In addition, offers for the sale of separately packed dried albumen and dried yolk (Product B) and for dried albumen (Product C) must also state:

f. The method (spray or pan) by which the albumen is processed, and, if a pan process is employed, whether the product is flake, granular, or powdered.

Terms and Conditions

In submitting an offer of sale, the following terms and provisions of this announcement shall become a part of the offer to sell, and upon acceptance by the Federal Surplus Commodities Corporation, hereinafter referred to as FSCC, the offer and acceptance shall constitute a valid and binding contract:

Part 1. *Period of Purchase:* Offers for the sale of dried egg products intended for delivery at any stipulated time through the calendar year 1942 may be submitted so as to be received by the Purchase Branch, AMA, at its Washington, D. C., office not later than 12 noon, EWT, on April 22, 1942, and on each Wednesday thereafter until further notice, but not later than June 30, 1942. Offers received after 12 o'clock noon each Wednesday and before the following Friday will not be considered. Offers received [fol. 15] Friday through Tuesday will be considered with those received on the following Wednesday morning and will be subject to acceptance accordingly, unless previously withdrawn.

Par. 2. *Quantity:* Consideration will be given to offers for any quantity not smaller than a minimum carlot, but offers in multiples of maximum carlots are preferred. For each contract, minus tolerances will be allowed, providing that the gross weight of each shipment is equal to existing

carlot minimums for the originating territory. The permitted tolerances are 1 per cent by weight for dried whole egg (Product A) and dried albumen (Product C), and 2 per cent by weight for separately packed dried albumen and dried yolk (Product B). In the case of separately packed albumen and yolk (Product B) the tolerance shall be calculated separately for each constituent, provided however, that if the actual delivery is in other than the prescribed proportions of 1:2.5, then payment will not be made for that quantity of either constituent delivered in excess of the prescribed proportions. It is desirable that offers and deliveries be computed so as to result in full barrels of each product.

Par. 3. *Quality:* Dried egg products delivered shall be those specified for each lot and shall conform to the following applicable specifications:

All dried egg products shall be prepared either from frozen egg products or from shell eggs. If prepared directly from shell eggs, such shell eggs must be candled before breaking and any unsound or unfit eggs revealed by candling must be discarded. Any remaining unsound or unfit eggs shall be discarded after breaking.

All processes and operations in the preparation of dried egg products must be carried out under strictly sanitary conditions and the failure to comply with this provision, [fol. 16] will result in the rejection of the product tendered for delivery.

Before packaging, dried whole egg and dried yolk delivered under the terms of this announcement shall be sifted, but not forced, through a screen not coarser than #10 U. S. Bureau of Standards sieve. There shall be no grinding before or after sifting.

Chemical analyses used in the examination or testing of samples and deliveries under these specifications shall be performed in accordance with methods of the Association of Official Agricultural Chemists in effect on date of invitation for bids.

All dried egg products shall conform with the provisions of the Federal Food, Drug and Cosmetic Act of June 25, 1938, and with all subsequent amendments and regulations promulgated before the date of this announcement.

The quality specifications applicable only to particular dried egg products are as follows:

Product A. Dried whole egg—This product shall be clean and free from contamination and from adulterants or preservatives. It shall be produced by the spray process and delivered in powdered form.

Dried whole egg shall have a sweet wholesome egg odor, both in dried form and when reconstituted. It shall be readily and almost completely soluble, and when reconstituted shall produce a smooth homogeneous mixture. It must contain not less than 94 per cent of total solids and not less than 40 per cent of fat as determined by acid hydrolysis. The acidity of the ether extract shall not exceed 3 milliliters of 0.05 normal sodium ethylate per gram of ether extract.

Product B. Separately-packed dried albumen and dried yolk in the proportions of 1 pound of dried albumen to 2.5 pounds of dried yolk—

(1) The albumen delivered under this description must [fol. 17] be clean and free from contamination and from adulterants or preservatives, but it may contain harmless processing materials used in good commercial practice to improve functional qualities.

The albumen delivered under this description shall be in either powdered, flake or granular form as specified in the offer. Deliveries of flake may not contain more than 20 per cent of granular or powdered albumen.

Dried albumen shall have a sweet wholesome albumen odor, both in the dried form and when reconstituted. The color of the product shall be light, and the material must be bright and clear. It shall be readily and substantially soluble. Dried albumen must also retain the whipping qualities of the fresh product in accordance with the following test: one and one-half ounces of dried albumen, when dissolved in 15 ounces of water at 70° F. and beaten in a Hobart electric whipper for 90 seconds in second speed and 90 seconds in third speed, shall produce a foam which when leveled fills the 10 quart bowl of the Hobart whipper to a uniform depth of at least 5½ inches.

Powdered pan dried albumen shall contain not less than 88 per cent total solids, flakes or granular albumen shall contain not less than 84 per cent total solids, and spray dried albumen shall contain not less than 92 per cent total solids.

(2) The dried yolk delivered under this description shall be clean and free from contamination and from adulterants or preservatives. It shall be produced by the spray process.

Dried yolk shall have a sweet wholesome egg yolk odor both in the dried form and when reconstituted. It shall be readily and almost completely soluble, and when reconstituted shall produce a smooth homogeneous mixture. The [fol. 18] product shall contain not less than 95 per cent total solids and not less than 57 per cent fat as measured by acid hydrolysis. The acidity of ether extract shall not exceed 3 milliliters of 0.05 normal sodium ethylate per gram of ether extract.

Product C. Dried albumen—The dried albumen delivered alone shall conform to the same specifications as the dried albumen delivered in combination with dried yolk.

Par. 4. *Inspection and Grading:* (*a*) Inspection of the product intended for delivery shall be performed by the Agricultural Marketing Administration of the United States Department of Agriculture, and it shall be incumbent upon the vendor to arrange with the AMA for inspection services. Inspection and weight certificates shall be issued at the expense of the vendor. Inspection and weight certificates shall be dated not more than 30 calendar days prior to the delivery date specified in the offer. The lots delivered to the FSCC must be the lots sampled and inspected by the AMA, and the grading certificates tendered the FSCC must name the manufacturer of the product, his identifying production lot number for the barrels in question, and the date of manufacture. Dried whole egg (Product A) and the dried yolk offered under the description product B (but not the albumen) manufactured more than 30 days prior to the delivery date specified in the offer will not be acceptable to the FSCC. In addition to the grading certificate, the vendor of Product A must tender with each delivery an affidavit, on form prescribed, attesting to the date of manufacture of the product. (b) At any time when any vendor has an outstanding Contract with FSCC for the delivery of dried egg products, he shall permit authorized representatives of the FSCC, during ordinary business hours, to examine his plant, equipment, processing methods, materials, books and production records to the extent that [fol. 19] is necessary to determine whether the provisions of such contract are being met.

Par. 5. *Packaging:* Dried egg products delivered to the FSCC under the terms of this announcement shall be packed in new standard commercial tongued and grooved barrels

of 150 to 200 pounds capacity, which barrels and necessary liners shall be included in the prices named in the offer. (The specifications for the barrels and liners are attached to this announcement.) All packages shall be so constructed as to insure acceptance by common or other carrier for safe transportation for export shipment at the lowest rates in effect.

Par. 6. *Marking:* Each barrel shall be clearly marked on the side with the following, in letters at least ¾ inch high:

(1) The name and type of dried egg product (In the case of separately-packed dried albumen and dried yolk, barrels containing albumen should be marked appropriately for albumen only, while barrels containing yolk only should be marked correspondingly).

(2) Net weight.

(3) FSC contract number.

(4) The vendor's name and delivery point address.

(5) The manufacturer's name and plant address, if either is different from the vendor's name and address.

(6) The first three letters of the month of manufacture, and the year.

(7) A legend which will be prescribed by the FSCC prior to shipment.

In addition, the barrels shall bear any additional information required for compliance with the Federal Food, Drug [fol. 20] and Cosmetic Act of June 25, 1938.

A sample marking is as follows:

SPRAY DRIED WHOLE EGG or
SPRAY DRIED EGG YOLK ONLY or
SPRAY or PAN DRIED EGG ALBUMEN ONLY,
POWDERED, GRANULAR, or FLAKE
175 LBS. NET
CONTRACT FSC-6940
AMALGAMATED BROKERS, INC.
ACROPOLIS, MICHIGAN
Mfg. by
CONSOLIDATED DEHYDRATORS, INC.
OTAKNAM, MINNESOTA
Jan., 1942
(Legend to be Prescribed)

Par. 7. *Delivery:* The date specified in the offer, pursuant to item C, shall be the first day of a 10-day period within which the FSCC will accept delivery, the particular day within the period being at the FSSC's option. Save for the exception noted below, failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer will be cause for invoking the provisions of paragraph 9 below. The only exception against invoking the provisions of paragraph 9 shall be when sampling and inspection by the Agricultural Marketing Administration had been requested for a date at least 10 days prior to the date specified in the offer, pursuant to item C and the sampling and inspection services were not forthcoming.

Dried eggs tendered for delivery must be accompanied by the original and two copies of the inspection and weight certificate issued by the Agricultural Marketing Administration and other affidavits and statements stipulated in this announcement. Vendors shall take whatever steps are [fol. 21] necessary to protect fully the dried egg products prior to delivery to the FSCC. Such protection within the prescribed delivery period shall be at the expense of the vendor.

Delivery shall be made at the point (or points) specified in the offer, f.o.b. railroad cars, or, at the option of the FSCC, f.o.b. truck or local warehouse specified by the FSCC.

Par. 8. *Acceptance:* Offers received by 12 noon, EWT, on each offering day shall be subject to acceptance by the FSCC, in whole or in part, by telegram filed on or before the second following day.

Par. 9. *Delays—Damages: Payment:* Inasmuch as the failure of the vendor to deliver the quantity of the commodity or commodities specified in the contract in accordance with the terms of this announcement will, because of the urgent need for the commodity by the purchaser arising from the present emergent conditions, cause serious and substantial damages to the purchaser, and it will be difficult, if not impossible, to prove the amount of such damages, the vendor agrees to pay to the FSCC liquidated damages as stated in this paragraph. The sum is agreed upon as liquidated damages and not as a penalty and shall be in the amount set forth below for each pound of dried egg product

undelivered in accordance with the terms of this announcement.

Contract Delivery Date (Date Specified in Offer)	Liquidated Damage Sum
Within and including 50 days of acceptance date	$0.10
51 to 115 days from acceptance date, inclusive	$0.15
116 to 180 days from acceptance date, inclusive	$0.20
181 to 245 days from acceptance date, inclusive	$0.25
246 to 311 days from acceptance date, inclusive	$0.30

The parties have computed, estimated, and agreed upon this sum as an attempt to make a reasonable forecast of [fol. 22] probable actual loss because of the difficulty of estimating with exactness the damages which result. However, if the President of the Federal Surplus Commodities Corporation determines that the failure to make delivery as herein agreed results from unforeseeable causes and without the fault or negligence of the vendor, the President of the Federal Surplus Commodities Corporation, upon request of the vendor, may extend the time for making delivery for such time as he deems reasonable under the circumstances and in view of the urgent needs of the purchaser. The President may delegate to any officer or employee or agent of the Federal Surplus Commodities Corporation the power herein given to determine whether the failure to deliver is due to unforeseeable cause beyond the control and without fault or negligence on the part of the vendor, and the determination of the President of the Federal Surplus Commodities Corporation or such officer or employee or agent in this respect shall be final and conclusive on the parties concerned.

Payment of vendor's invoices will be made as soon as practicable after submission of a correct claim or claims, and payment will be contingent upon compliance with conditions set forth in this announcement.

Par. 10. *Contract of Sale:* This announcement, together with the offer and acceptance, shall constitute the contract of sale between the vendor and the Federal Surplus Commodities Corporation.

Further details with respect to this program may be obtained by communicating with the Washington office, Telephone: Republic 4142—Extension 2766.

H. C. Albin, Chief, Purchase Branch Agricultural Marketing Administration.

[fol. 23] EXHIBIT B TO AMENDED PETITION

4-22-42 serial prepaid
Mr. H. C. Albin, Chief, Purchase Div.
Dairy-Poultry Branch A.M.A.
U. S. Dept. of Agriculture,
1014 Fifth St. N. W.,
Washington, D. C.

OFFER SUBJECT TERMS ANNOUNCEMENT FCS-450 FOLLOWING TYPE A SPRAY DRIED WHOLE MIXED EGGS: FOR DELIVERY ON OR BEFORE MAY 18, 90,000# at 93¾c per pound fob. Sleepy Eye, Minn. on Northwestern RR., 110,000# at 93¾c fob. Manning, Iowa on Milwaukee, Greatwestern or Northwestern R.R., 69,000# at 94c fob. Des Moines, Iowa on Fort Dodge, Des Moines & Southern RR. FOR DELIVERY FROM DECEMBER 16 to 31, 40,000# at $1.14¾ fob. Sleepy Eye, Minn., on Northwestern RR. FOR DELIVERY FROM JUNE 1 to 15, 20,000# at 95¼c, from June 16 to 31, 20,000# at 96¾c, from July 1 to 15, 20,000# at 98¼c, from July 16 to 31, 23,000# at 99¾c, from August 1 to 15, 23,000# at $1.01¼, from August 16 to 31, 23,000# at $1.02¾, all fob. MANNING, IOWA on MILWAUKEE, GREATWESTERN OR NORTHWESTERN RR.

PRIEBE & SONS INC.

[fol. 24] EXHIBIT C TO AMENDED PETITION

4-22-42 serial prepaid
Mr. H. C. Albin, Chief, Purchase Div.
Dairy-Poultry Branch A.M.A.
U. S. Dept. of Agriculture,
1014 Fifth St. N. W.,
Washington, D. C.

REFERENCE THIS MORNING'S WIRE, OFFERED YOU DRIED EGGS UNDER ANNOUNCEMENT FSC 450 BUT MEANT AND OF COURSE SHOULD HAVE STATED ANNOUNCEMENT FSC 553. PLEASE SO HANDLE. THANKS.

PRIEBE & SONS INC.

[fols. 25-26] EXHIBIT D TO AMENDED PETITION

A WASHINGTON DC 8 19P APR 23 1942

PRIEBE AND SONS INC

CHICAGO ILL

SUBJECT TERMS ANNOUNCEMENT FSC 553 FSCC ACCEPTS YOUR DRIED WHOLE EGG OFFER OF APRIL 22 AS AMENDED APRIL 22 FOR PRODUCT A: 90000 POUNDS AT 93.75 CENTS PER POUND FOR SLEEPYEYE MINNESOTA 110000 POUNDS AT 93.75 CENTS PER POUND MANNING IOWA 60000 AT 94 CENTS DES MOINES IOWA ALL MAY 18 DELIVERY 40000 AT $1.1475 FOR DELIVERY DECEMBER 31 SLEEPYEYE MINNESOTA 23000 AT 95.25 CENTS FOR JUNE 15 DELIVERY 23000 AT 96.75 CENTS FOR JUNE 31 DELIVERY 23000 AT 98.25 CENTS JULY 15 DELIVERY 23000 AT 99.75 CENTS JULY 31 DELIVERY 23000 AT $1.0125 FOR AUGUST 15 DELIVERY 23000 AT $1.0275 FOR AUGUST 31 DELIVERY ALL FOB MANNING IOWA. CONTRACT FSC 22289

H C ALBIN CHIEF PUR BRANCH
AGRI MKTG ADMN 9 30 P

[fols. 27-28] GENERAL TRAVERSE—Filed April 10, 1944

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

Francis M. Shea, Assistant Attorney General.

SRG
EEE

ARGUMENT AND SUBMISSION OF CASE

On January 8, 1944, the case was argued and submitted on merits by Mr. J. Arthur Miller for plaintiff, and by Mr. S. R. Gamer for defendant.

[fol. 29] V. **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Littleton, J., Dissenting Opinion by Jones, J.**—Filed May 6, 1946

Mr. J. Arthur Miller for plaintiff.

Messrs. Campbell, Clerk & Miller, Morris, KixMiller & Baar, and Mr. Allen H. Gardner were on brief.

Mr. S. R. Gamer with whom was *Mr. Assistant Attorney General John F. Sonnett*, for defendant.

Plaintiff sues to recover $14,482.90 under a contract with defendant on April 23, 1942, which so far as here material, called for 200,000 pounds of dried eggs. The amount claimed by plaintiff represents liquidated damage deducted by defendant, under the provisions of paragraphs 7 and 9 of the contract, from the amount otherwise due.

Plaintiff says, first, that on the facts the liquidated damage should not have been imposed and deducted and, second, that in the circumstances the amount involved was a penalty rather than damage because the defendant did not sustain, and, in the circumstances of this case, could not have sustained any damage by reason of plaintiff's failure to have inspection certificates for the two lots of eggs in question on May 18, 1942, as required by the contract as written, and that on the facts and under the contract terms and conditions there is no basis for withholding the amount deducted.

Special Findings of Fact

1. Plaintiff is and at all times hereinafter mentioned was a Delaware corporation with its principal place of business in Chicago, Illinois.

[fol. 30] 2. During negotiation and performance of the contract hereinafter mentioned the Agricultural Marketing Administration, referred to below as AMA, was an agency of the Department of Agriculture of the United States, and was vested, by consolidation, with the functions and responsibilities of the Federal Surplus Commodities Corporation, hereinafter called FSC, and other Federal agencies. FSC was a nonstock and nonprofit corporation organized under the laws of the State of Delaware and designated by statute as an agency of the United States under the supervision of the Secretary of Agriculture.

3. April 23, 1942, FSC and plaintiff entered into a contract in the following manner:

April 14, 1942, AMA issued an announcement that it would consider offers for the sale of dried egg products, which announcement reads in part:

Announcement FSC-553

Purchase of Dried Egg Products

(Supersedes Announcement FSC—450)

The Agricultural Marketing Administration announces that it will receive and consider offers for the sale of the following dried egg products, which may for convenience be referred to by their identifying letters:

Product A. Spray dried whole egg.

• • • • • • • • •

Offers submitted pursuant to this announcement will be accepted by, and after acceptance will become contracts with, the Federal Surplus Commodities Corporation.

How to Submit an Offer

Offers may be submitted by letter or telegram to the Purchase Branch, Agricultural Marketing Administration, United States Department of Agriculture, Washington, D. C., and must state the following:

a. That the offer is made subject to the terms of Announcement FSC-553.

b. The number of pounds of each dried egg product offered at each delivery point.

[fol. 31] c. The beginning date of the delivery period during which the vendor agrees to make delivery (N. B. Par. 7—Delivery).

d. Price in cents per pound for each dried egg product, f. o. b. cars, trucks, or warehouses at each delivery point.

• • • • • • • •

Terms and Conditions

In submitting an offer of sale, the following terms and provisions of this announcement shall become a part of

the offer to sell, and upon acceptance by the Federal Surplus Commodities Corporation, hereinafter referred to as FSCC, the offer and acceptance shall constitute a valid and binding contract.

* * * * * * * * *

Par. 2. Quantity.—* * * The permitted tolerances are 1 percent by weight for dried whole egg (Product A) * * *

Par. 3. Quality.—Dried egg products delivered shall be those specified for each lot and shall conform to the following applicable specifications:

* * * * * * * * *

Chemical analyses used in the examination or testing of samples and deliveries under these specifications shall be performed in accordance with methods of the Association of Official Agricultural Chemists in effect on date of invitation for bids.

All dried egg products shall conform with the provisions of the Federal Food, Drug and Cosmetic Act of June 25, 1938, and with all subsequent amendments and regulations promulgated before the date of this announcement.

The quality specifications applicable only to particular dried egg products are as follows:

Product A.—Dried whole egg—This product shall be clean and free from contamination and from adulterants or preservatives. It shall be produced by the spray process and be delivered in powdered form.

Dried whole egg shall have a sweet wholesome egg odor, both in dried form and when reconstituted. It shall be [fol. 32] readily and almost completely soluble, and when reconstituted shall produce a smooth homogeneous mixture. It must contain not less than 94 percent of total solids and not less than 40 percent of fat as determined by acid hydrolysis. The acidity of the ether extract shall not exceed 3 milliliters of 0.05 normal sodium ethylate per gram of ether extract. * * *

Par. 4. Inspection and Grading.—(a) Inspection of the product intended for delivery shall be performed by the Agricultural Marketing Administration of the United States Department of Agriculture, and it shall be incumbent upon the vendor to arrange with the AMA for inspection

services. Inspection and weight certificates shall be issued at the expense of the vendor. Inspection and weight certificates shall be dated not more than 30 calendar days prior to the delivery date specified in the offer. The lots delivered to the FSCC must be the lots sampled and inspected by the AMA, and the grading certificates tendered the FSCC must name the manufacturer of the product, his identifying production lot number for the barrels in question, and the date of manufacture. Dried whole egg (Product A) • • • manufactured more than 30 days prior to the delivery date specified in the offer will not be acceptable to the FSCC. In addition to the grading certificate, the vendor of Product A must tender with each delivery an affidavit, on form prescribed, attesting to the date of manufacture of the product. (b) At any time when any vendor has an outstanding Contract with FSCC for the delivery of dried egg products, he shall permit authorized representatives of the FSCC, during ordinary business hours, to examine his plant, equipment, processing methods, materials, books and production records to the extent that is necessary to determine whether the provisions of such contract are being met.

Par. 5. Packaging.—Dried egg products delivered to the FSCC under the terms of this announcement shall be packed in new standard commercial tongued and grooved barrels of 150 to 200 pounds capacity, which barrels and necessary liners shall be included in the prices named in the offer. [fol. 33] (The specifications for the barrels and liners are attached to this announcement.) All packages shall be so constructed as to insure acceptance by common or other carrier for safe transportation for export shipment at the lowest rates in effect.

Par. 6. Marking.—Each barrel shall be clearly marked on the side with the following, in letters at least ¾ inch high:

(1) The name and type of dried egg product • • •

(2) Net weight.

(3) FSC contract number.

(4) The vendor's name and delivery point address.

(5) The manufacturer's name and plant address, if either is different from the vendor's name and address.

(6) The first three letters of the month of manufacture, and the year.

(7) A legend which will be prescribed by the FSCC prior to shipment.

In addition, the barrels shall bear any additional information required for compliance with the Federal Food, Drug, and Cosmetic Act of June 25, 1938.

. . . . . .

Par. 7. Delivery.—*The date specified in the offer, pursuant to item C, shall be the first day of a 10-day period within which the FSCC will accept delivery, the particular day within the period being at the FSCC's option.* Save for the exception noted below, failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer will be cause for invoking the provisions of Paragraph 9 below. The only exception against invoking the provisions of Paragraph 9 shall be when sampling and inspection by the Agricultural Marketing Administration had been requested for a date at least 10 days prior to the date specified in the offer, pursuant to item C and the sampling and inspection services were not forthcoming. [Italics supplied.]

Dried eggs tendered for delivery must be accompanied by the original and two copies of the inspection and weight certificate issued by the Agricultural Marketing Administration and other affidavits and statements stipulated in this announcement. Vendors shall take whatever steps are [fol. 34] necessary to protect fully the dried egg products prior to delivery to the FSCC. Such protection within the prescribed delivery period shall be at the expense of the vendor.

Delivery shall be made at the point (or points) specified in the offer, f. o. b. railroad cars, or, at the option of the FSCC, f. o. b. truck or local warehouse specified by the FSCC.

. . . . . .

Par. 9. Delays—Damages: Payment.—Inasmuch as the failure of the vendor to deliver the quality of the commodity or commodities specified in the contract in accordance with the terms of this announcement will, because of the urgent

need for the commodity by the purchaser arising from the present emergent conditions, cause serious and substantial damages to the purchaser, and it will be difficult, if not impossible, to prove the amount of such damages, the vendor agrees to pay to the FSCC liquidated damages as stated in this paragraph. The sum is agreed upon as liquidated damages and not as a penalty, and shall be in the amount set forth below for each pound of dried egg product undelivered in accordance with the terms of this announcement.

Contracted delivery date (date specified in offer):	Liquidated damage sum
Within and including 50 days of Acceptance date	$0.10
51 to 115 days from acceptance date, inclusive	.15
116 to 180 days from acceptance date, inclusive	.20
181 to 245 days from acceptance date, inclusive	.25
246 to 311 days from acceptance date, inclusive	.30

The parties have computed, estimated, and agreed upon this sum as an attempt to make a reasonable forecast of probable actual loss because of the difficulty of estimating with exactness the damages which result. However, if the President of the Federal Surplus Commodities Corporation determines that the failure to make delivery as herein agreed results from unforeseeable causes and without the fault or negligence of the vendor, the President of the Federal Surplus Commodities Corporation, upon request of the vendor, may extend the time for making delivery for such time as he deems reasonable under the circumstances and in view of the urgent needs of the pur- [fol. 35] chaser. The President may delegate to any officer or employee or agent of the Federal Surplus Commodities Corporation the power herein given to determine whether the failure to deliver is due to unforeseeable causes beyond the control and without fault or negligence on the part of the vendor, and the determination of the President

of the Federal Surplus Commodities Corporation or such officer or employee or agent in this respect shall be final and conclusive on the parties concerned.

Payment of vendor's invoice will be made as soon as practicable after submission of a correct claim or claims, and payment will be contingent upon compliance with conditions set forth in this announcement.

Par. 10. Contract of Sale.—This anouncement, together with the offer and acceptance, shall constitute the contract of sale between the vendor and the Federal Surplus Commodities Corporation.

4. April 22, plaintiff sent a telegram to AMA which, as amended by a second telegram the same day, reads, in part:

> Offer subject terms announcement FSC-553 following type a spray dried whole mixed eggs: for delivery on or before May 18, 90,000# at 93¾¢ per pound fob. Sleepy Eye, Minn. • • • 110,000# at 93¾¢ fob. Manning, Iowa • • •

April 23, AMA sent a telegram to plaintiff which reads in part:

> Subject terms announcement FSC 553, FSCC accepts your dried whole egg offer of April 22 • • • 90,000 pounds at 93.75 cents per pound fob. Sleepy Eye, Minnesota, 110,000 pounds at 93.75 cents per pound Manning, Iowa • • • all May 18 delivery. • • • contract FSC 22289.

April 24, plaintiff sent a telegram to AMA which reads in part:

> Confirm sale under contract FSC-22289 terms announcement FSC-553 following dried whole eggs: May 18 delivery 90,000 lbs at 93.75 cents per pound fob. Sleepy Eye, Minn. 110,000 lbs at 93.75 cents for Manning, Iowa • • •

[fol. 36] 5. The contract included agreements to deliver dried eggs on various dates and at various shipping points other than those involved in this action. This action involves only deliveries made under that portion of the agreement by which plaintiff promised to deliver 200,000 pounds f. o. b. Manning, Iowa, and Sleepy Eye, Minnesota, within

a ten-day period commencing May 18, the precise date to be selected by the FSC.

6. In preparation for filling the orders plaintiff manufactured the product and, following the general procedure adopted for these and other deliveries, made written application to AMA upon a form provided by AMA, for the sampling, weighing, analyzing, and grading of the dried eggs. In response an AMA representative would visit the particular plant, check the barrels in which the powder was contained, make certain the barrels were marked as required by the contract, check the date of manufacture, and make test weights. He would take samples of the powder and forward them to the AMA laboratory at Chicago, Illinois, with a report of his findings. The AMA laboratory would then analyze and grade the powder and would issue a certificate which would include the results of the sampler's investigation as well as the results of the laboratory analyses. Such certificate would identify the powder by reference to lot numbers and, except in rare instances, the number of the contract to which the powder was applied. As soon as the laboratory analyses had been completed and before the certificate was typed, a telegram was sent to plaintiff advising whether the product had passed inspection, which telegram would give the number of the certificate. The certificate would be dated as of the date of completion of the analyses. The analyses ordinarily took one to three days after the arrival of the samples at the laboratory and one to several days were required for the samples to reach the laboratory after the sampling at the plant, depending upon current conditions. None of the powder here involved was delivered to the railroad prior to the time the analyses were completed and the certificates issued.

7. The 200,000 pounds of the powder contracted for as above set forth, constituted a number of carloads. The pro- [fol. 37] cedure followed by the parties in the ordering out and shipping of the several carloads was substantially as follows:

AMA from Washington would send to plaintiff at Chicago a written notice to deliver, specifying the quantity, the place from which the powder was to be shipped, the destination, and the particular time within the ten-day period provided by the contract at which delivery must be made. A Govern-

ment bill of lading was enclosed for each carload ordered to be shipped.

Upon receipt of the notice at Chicago, plaintiff would send it promptly to the plant at the designated place of delivery together with the Government bill of lading and, at the plant, plaintiff would promptly deliver the powder to the railroad. In the case of the shipments here involved, the original AMA grading and weighing certificate was not sent to plaintiff but was retained by the AMA and, through intradepartmental communication, was attached to plaintiff's vouchers for payment after they had been presented to FSC.

8. The first notice to deliver dried eggs under the 200,000-pound portion of the contract here involved was for 54,945 pounds. This notice dated May 15, three days prior to the beginning of the ten-day period specified in the contract, directed shipment "immediately." The powder was shipped May 17 and 18 and was duly paid for by defendant. These shipments are not material to this suit, except that they complete the total of 200,000 pounds contracted for delivery within the ten days commencing May 18.

9. By notice dated May 26, within the ten-day period specified in the contract, FSC directed plaintiff to ship "immediately" 54,930 pounds of powder from Manning, Iowa. The powder, shipped in two cars, had been manufactured May 11-14, inclusive, was sampled May 14 and 15, and the AMA grading and weight certificate was issued May 20. The powder was delivered to the railroad May 26.

By notice dated May 29, the second day after the end of the ten-day period provided by the contract, FSC requested plaintiff to ship "immediately" 22,500 pounds of powder from Sleepy Eye, Minnesota. The powder, shipped in one car, had been manufactured May 9-12, inclusive, had been [fol. 38] sampled May 13, and the AMA certificate was issued May 21. The powder was delivered at the railroad June 2.

By notice dated June 4, the eighth day after the end of the ten-day period provided by the contract, following telegraphic appeal from plaintiff asking for shipping instructions because the powder was taxing storage facilities at the plant, FSC requested plaintiff to ship "immediately" 67,500 pounds of powder from Sleepy Eye, Minnesota. The powder, shipped in three cars, had been manufactured May 12-16, inclusive, had been sampled May 15 and 18, and the

AMA certificates were issued May 20 and 22. The powder was delivered at the railroad June 5.

All of said dried egg powder was found upon AMA inspection to meet the requirements of the contract, and the inspection certificates set forth the facts which so indicated. Said powder was accepted by FSC without complaint or objection, except as indicated hereinafter.

The total number of pounds ordered by FSC out of the 200,000-pound portion was within the tolerance of 1% weight permitted by paragraph 2 of the announcement, and no question is raised in that connection.

10. For convenient reference, the shipments here involved are tabulated as follows:

Date of notice to deliver	Date of manufacture	Date of sampling	Date of AMA certificate	Date shipped
May 26; 54,930#	(a) May 11, 12, 13	May 14	May 20	May 26; 27,465#
	(b) May 12, 13, 14	May 15	May 20	May 26; 27,475#
May 29; 22,500#	(c) May 9, 11, 12	May 13	May 21	June 2; 22,440#
June 4; 67,500#	(d) May 12, 13, 14	May 15	May 20	June 5; 21,120#
	(e) May 14, 15, 16	May 18	May 22	June 5; 23,724#
	(f) May 14, 15, 16	May 18	May 22	June 5; 22,605#
				Total: 144,829#

11. As each car was shipped, plaintiff billed defendant on the public voucher form prescribed therefor and after all the shipments here involved had been made and accepted by the FSC, defendant notified plaintiff that it was withholding from payments due plaintiff on account of other transactions, about which there is no dispute between the parties, the sum of $11,736.40. This sum represented an assessment of liquidated damages of 10 cents per pound on the shipments marked "b" to "f" inclusive in the table in finding 10.

[fol. 39] Attached to the notice was a memorandum of explanation which reads in part as follows:

> Contract FSC-22289 under the terms of Announcement FSC-553 provides for the delivery of Dried Whole Eggs for May 18, 1942, delivery as indicated in the offer dated April 22, 1942, and the offer accepted April 23, 1942.
>
> Announcement FSC-553 paragraph No. 7, "Delivery"—Dried Egg products accepted for delivery shall

be ready for delivery on the date specified in the offer, or if an inspection by Agricultural Marketing Administration had been requested for a date at least ten (10) days prior to the date specified in the offer, and sampling and inspection services were not forthcoming.

Inspection Certificates covering various lots shipped under Contract FSC-22289 as listed below indicate the eggs were not ready for delivery on the dates specified above. Such late deliveries shall be subject to liquidated damages at ten (10¢) per pound.

[here in tabular form are listed the shipments, showing that the dates of the inspection certificates were 1, 2 and 3 days subsequent to May 18, the date of "delivery as indicated in the offer."]

Total Number of Pounds	117,364
117,364 Pounds at $0.10 per pound	$11,736.40

12. June 13, 1942, pursuant to provisions in paragraph 9 of the announcement, plaintiff, in writing, appealed such assessment to the president of FSC.

September 9, 1942, the president of FSC denied said appeal in the following communication which was sent to plaintiff:

Following our conversation the other day, I have had the matter of the assessment of liquidated damages under Contract FSC-22289 (Bureau Voucher No. 2378) reviewed.

The contract is specific with respect to the matter of delivery dates, and there appears to be no evidence before us showing that the delay was due to unforeseeable causes beyond your control and without fault or negligence on your part. It may be that there are facts and [fol. 40] circumstances which would justify further action, but if so your case has not been adequately presented.

Certainly I have no desire to assess a penalty unnecessarily. Likewise I cannot be placed in the position of authorizing payment of a larger amount than is necessary under a government contract without clear justification. Any such action is subject to review by the General Accounting Office, and on the basis of this record I am satisfied an exception in your case would be disallowed. There have been a number of other con-

tracts where liquidated damages have been assessed. Auditors can certify payment only on the basis of the actual terms of the contract. If you feel that your case has been submitted fully, we are unable to make an exception. If there are any further facts or circumstances you wish to call to our attention we will be glad to have them.

Before making this decision the president referred the matter to a committee for consideration and advice. The committee unanimously recomended to the president that the assessment not be remitted.

Subsequently, plaintiff again appealed to the president of FSC and submitted a legal brief in support of its appeal. January 16, 1943, this second appeal was denied by letter to plaintiff. Said letter stated that plaintiff's legal brief had been submitted to the "Solicitor of the Department for review and opinion. You are advised that this office is now in receipt of a Memorandum from the Solicitor stating that the liquidated damages were properly assessed by our Audit Division and that the recent contention of your attorneys cannot be accepted as grounds for relief from the operation of the Contract."

13. January 5, 1944, several months after plaintiff's petition in this suit had been filed, defendant notified plaintiff that it was withholding from payments due plaintiff on account of other transactions, about which there is no dispute between parties, the further sum of $2,746.50.

The notice called attention to the above contract and further stated:

> [fol. 41] Paragraph 7 of the above Announcement indicated that failure by the vendor to have specified quantities of the dried egg product inspected and ready for delivery by the date specified in the offer will be cause for assessing liquidated damages in accordance with the terms of Paragraph 9. F. O. B. Manning, Iowa.

The tabulation attached to the notice shows that the certificate covering the powder contained in the shipment marked "a" in the table in finding 10 was dated May 20, two days after May 18, "the date specified in the offer."

14. There was no delay on the part of plaintiff, after notice to deliver, in making prompt delivery to the railroad

cars at the points specified in the notices and it is not contended that FSC, AMA, or other agency or facility, or the ultimate consumers were delayed or otherwise inconvenienced by the fact that the inspection certificates were not available on May 18. The assessment of liquidated damages was based upon the fact that the inspection certificates were dated May 20, 21, and 22, respectively, instead of on or before May 18, the beginning day of the ten-day period within which defendant had option to order delivery, and upon the theory that, in consequence, the powder was "undelivered in accordance with the terms of this announcement" (announcement, paragraph 9), because of plaintiff's "failure to have the specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer" (announcement, paragraph 7).

15. Plaintiff had on hand on May 18 at Manning, Iowa, 47,416 pounds of powder which prior to that time had been inspected and AMA certificates issued thereon. F. M. Stamper & Co., a corporation, having interlocking stockholders, directors, and officers with the plaintiff, had on hand on May 18 at Moberly and St. Louis, Missouri, 139,625 pounds of powder which prior to that time had been inspected and AMA certificates issued thereon. L. D. Schreiber and Co., Inc., a corporation, had on hand on May 18 at Manning, Iowa, 15,750 pounds of powder which had been inspected and AMA certificates issued thereon prior to May 18. Between themselves, plaintiff and Schreiber had per-
[fol. 42] formed that portion of the contract which was to be performed at Manning, Iowa, as a joint venture. The powder belonging to the Stamper Company and the Schreiber Company could have been obtained by plaintiff on May 18 and on each of the ten days immediately following, but only with defendant's consent.

[illegible] of said 187,041 pounds of powder had been inspected to fulfill the terms of other contracts which plaintiff and said other companies had entered into with FSC, and all of said AMA certificates which had been issued thereon bore contract numbers different from the contract involved in this case. Switching inspected powder from one contract to another was not permitted without defendant's consent and would have to be evidenced by the issuance of an amendment to the certificate which bore the number of the contract to which the powder was applied. Said powder of the

Schreiber Company was on May 18 being held by that company against a May 16 delivery date contract. Said powder which plaintiff had on hand on May 18 was held by it against a May 11 delivery date contract.

16. The circumstances connected with the making of the contract were: Shortly after the Lend-Lease Act of March 11, 1941, was enacted, the defendant embarked on a program of purchasing dried eggs, principally for shipment to England, to alleviate the food shortage in that country. The Department of Agriculture in cooperation with the industry made extensive plans for production and purchase by the defendant of greatly increasing amounts. Commencing in April 1941, and at various times thereafter, the defendant through the FSC published announcements, invited offers, and made contracts for the purchase of egg products similar to the contract hereinbefore described. The FSC had its operation scheduled on a monthly basis to meet commitments to England and Russia under the Lend-Lease Act. The program was affected by the shipping situation and had to be correlated with it. Shipping space was at a premium and it was imperative that no vessel depart with unfilled space because of the failure of a producer to have his product ready by the time specified in his offer. The urgency related to time and not to considerations of cost. As a result, commencing February 25, 1942, [fol. 43] a provision for liquidated damages was included in the announcements. The graded scale of damages was an estimate based upon the experience of defendant with egg market trends, the announcement being issued in the spring when the price of fresh eggs was low and the increases in the scale of liquidated damages corresponding with estimated increases in the market prices of eggs during equivalent periods. The underlying and important reason for the provision, however, was to assure the receipt of the product at the times specified in the contracts. The clause was inserted to encourage the producers of the dried egg products to have the products available on the dates for which contracted.

17. The reason for the provision in par. 7 of the contract permitting FSC to take delivery during a 10-day period after the date specified in the offer is as follows: As hereinbefore stated, the program had to be correlated with the shipping situation. Much of the powder was shipped di-

rectly to vessels. However, incoming vessels were often delayed in arriving. Also, the powder would sometimes be shipped to a packing plant for packaging in containers suitable for consumer use. At times such plants would be operating at capacity and could not absorb any more powder. In addition, powder would sometimes be shipped to cold storage warehouses as an incident to the packaging program or to await incoming convoys. At times, however, such warehouses would be filled to capacity. The purpose of allowing FSC 10 days after the contract delivery date to accept delivery was to give FSC some leeway in its program to meet such contingencies. It was due to all the above factors, especially the situation with respect to the packaging plants, that caused FSC to delay calling for delivery of some of the powder herein involved until May 29, 1942 and June 4, 1942. All of the 200,00 pounds of powder herein involved was ordered shipped to packaging plants and cold storage companies, although other powder under the same contract was ordered shipped directly to the British Ministry of War Transport. When FSC failed to order shipment during said 10-day contract option period, thereby causing the producer to store the powder beyond such period, FSC would entertain a claim by the producer to reimburse him for such extra costs as may have been incurred by the producer for such excess storage. Plain-[fol. 44] tiff has never made any such claims with respect to any of the powder involved in this suit.

Plaintiff commenced its dried egg business almost as soon as the Government program began in 1941, and did a very large amount of such business with FSC, both under the instant announcement and previous ones. It was fully familiar with the program, the details of the Government operation, and the relationship of the program to the war effort.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and the petition is dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion

Littleton, Judge, delivered the opinion of the court:

The only question presented in this case is whether plaintiff is entitled to recover $14,482.90 liquidated damage deducted by defendant under the express terms of a contract by reason of the failure of plaintiff to have certain quantities, totalling 114,829 pounds, of dried eggs manufactured, inspected, tested, accepted and ready for delivery or shipment in part at Manning, Iowa, and in part at Sleepy Eye, Minn., on the contract date of May 18, 1942. Six certain lots of the eggs at these two points were not ready for delivery until May 20, 21, and 22, respectively, and the stipulated liquidated damage of 10 cents a pound was accordingly charged and deducted from amounts otherwise due plaintiff. This contract called for 200,000 pounds but the balance of 45,945 pounds is not here in question.

In 1941 the Government through the Agricultural Marketing Administration (herein referred to as AMA) and the Federal Surplus Commodities Corporation (herein referred to as FCC), agencies of the Department of Agriculture, entered upon a program of purchasing, through contracts, dried or powdered eggs. Plaintiff commenced [fol. 45] its dried egg business almost at the inception of this program and did a very large amount of such business under such contracts with FCC before and after April 23, 1942, the date of the contract for dried eggs involved in this case. Plaintiff was familiar with the program, the details of the Government operations in connection therewith, and the relationship of the program to the war effort.

The contract in suit was entitled "Announcement FSC-553, Purchase of Dried Egg Products."

The detailed facts, about which there is no dispute, concerning the making on April 23, 1942, of the written contract in suit and the terms and conditions thereof are set forth in findings 3-5. Plaintiff fixed the delivery date of May 18, 1942, for the 200,000 pounds of dried eggs (herein sometimes called powder) called for by the contract under par. 1 (c) thereof, which required that the seller state "The beginning date of the delivery period during which the vendor agrees to make delivery (N. B. Par. 7—Delivery)." Paragraphs 3 and 4 related to inspection and grading and

the chemical analysis to be used in the examination and testing of samples (finding 3). Paragraph 4 required that inspection of the powder must be by the AMA and made it incumbent on plaintiff to arrange for such service. In addition it was provided that "Inspection and weight certificates shall be issued at the expense of the vendor. Inspection and weight certificates shall be dated not more than 30 calendar days prior to the delivery date specified in the offer. The lots delivered to the FSCC must be the lots sampled and inspected by the AMA, and the grading certificates tendered the FSCC must name the manufacturer of the product, his identifying production lot number for the barrels in question, and the date of manufacture." Inspection certificates were issued and dated on the day defendant completed the analysis of samples at its Chicago Laboratory and plaintiff was immediately notified by wire whether the samples had or had not met the required test and was given the number of each certificate for each lot so inspected. There was no delay in inspecting, weighing, taking samples of each lot and analyzing them. The AMA inspector weighed and took samples of each of the six lots here involved on the first or second day after completion of manufacture and these samples were tested and analyzed [fol. 46] as promptly as was possible. The final inspection certificates for the powder here involved were issued from 4 to 7 days after the date on which samples of each lot were taken. Plaintiff does not claim that inspection certificates should or could have been issued earlier.

Paragraphs 7 and 9 of the contract provided, so far as here material, as follows:

> Par. 7. *Delivery:* The date specified in the offer, pursuant to item C, shall be the first day of a 10-day period within which the FSCC will accept delivery, the particular day within the period being at the FSCC's option. Save for the exception noted below, failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer will be cause for invoking the provisions of paragraph 9 below. The only exception against invoking the provisions of paragraph 9 shall be when sampling and inspection by the Agricultural Marketing Administration had been requested for a date at least 10 days prior to the date specified in the offer,

pursuant to item C and the sampling and inspection services were not forthcoming.

Dried eggs tendered for delivery must be accompanied by the original and two copies of the inspection and weight certificates issued by the Agricultural Marketing Administration and other affidavits and statements stipulated in this announcement.

* * * * * * *

Par. 9. *Delays—Damages: Payment:* Inasmuch as the failure of the vendor to deliver the quantity of the commodity or commodities specified in the contract in accordance with the terms of this announcement will, because of the urgent need for the commodity by the purchaser arising from the present emergent conditions, cause serious and substantial damages to the purchaser, and it will be difficult, if not impossible, to prove the amount of such damages, the vendor agrees to pay to the FSCC liquidated damages as stated in this paragraph. The sum is agreed upon as liquidated damages and not as a penalty, and shall be in the amount set forth below [fol. 47] for each pound of dried egg product undelivered in accordance with the terms of this announcement.

Contracted delivery date (date specified in offer):	*Liquidated damage sum*
Within and including 50 days of acceptance date	$0.10

* * * * * * *

The parties have computed, estimated, and agreed upon this sum as an attempt to make a reasonable forecast of probable actual loss because of the difficulty of estimating with exactness the damages which result. However, if the President of the Federal Surplus Commodities Corporation determines that the failure to make delivery as herein agreed results from unforeseeable causes and without the fault or negligence of the vendor, the President of the Federal Surplus Commodities Corporation, upon request of the vendor, may extend the time for making delivery for

such time as he deems reasonable under the circumstances and in view of the urgent needs of the purchaser. The President may delegate to any officer or employee or agent of the Federal Surplus Commodities Corporation the power herein given to determine whether the failure to deliver is due to unforeseeable causes beyond the control and without fault or negligence on the part of the vendor, and the determination of the President of the Federal Surplus Commodities Corporation or such officer or employee or agent in this respect shall be final and conclusive on the parties concerned.

The liquidated damage of $14,482.90 at the agreed rate of 10 cents a pound was imposed and deducted from the contract price in making payments to plaintiff for the 114,482 pounds of powder in question. Plaintiff appealed to the President of FCC for remission of the liquidated damage and its appeal was considered and denied, as was also a petition and brief for reconsideration.

Plaintiff admits that it was at fault in not having the powder ready for delivery on May 18, but argues that paragraphs 1, 7, and 9 of the contract, which had to do with liquidated damage, did not intend that the stipulated liqui- [fol. 48] dated damage should be exacted where there had "been no possibility of actual damage" due to failure to have the eggs inspected and ready for delivery on or before May 18; that there was no such possibility of damage in this case because the inspection certificates were issued on May 20, 21, and 22, 1942, respectively, and defendant did not give notice of call for delivery of the eggs f. o. b. Manning, Iowa, and Sleepy Eye, Minn., until May 26, 29, and June 4, respectively; and that if it should be held that the contract intended to make the liquidated damage due if the eggs were not ready for delivery on May 18 because it was contemplated by the contract that the FCC might have given notice to deliver on that date, "plaintiff could have shipped other dried eggs certified before that date." We think none of these contentions can be sustained under the terms of the contract and the evidence of record. The language of paragraphs 1, 3, 4, 7, and 9 relating to the delivery date, inspection certificates and liquidated damage is very plain and unambiguous, and there is no room for construction.

Plaintiff, however, seeks to find an ambiguity by referring to the 10-day period allowed FCC to call for shipment of the powder and says it must have been intended by that provision that the 10-cents-a-pound damage would accrue if the powder was not inspected and ready when called for. Paragraph 7 appears to have been designed and intended to avoid just such a claim by expressly providing that the delivery date intended by the contract "shall be the first day of a 10-day period"; that "failure to have specified quantities of dried egg products inspected and ready for delivery by the date [May 18] specified in the offer will be cause for invoking the provisions of paragraph 9," which provided for the payment of liquidated damage of 10 cents a pound for a delay up to 50 days in the event of failure of plaintiff to have the eggs ready for delivery in accordance with the terms of the contract. Moreover, paragraph 7 provided that the only exception against exaction of the liquidated damage under paragraph 9 "shall be when sampling and inspection * * * had been requested for a date at least 10 days prior" to May 18, "and the sampling [fol. 49] and inspection services were not forthcoming." The phrase "undelivered in accordance with the terms of this announcement [contract]" appearing in paragraph 9 must be read in the light of paragraph 7 and, when so read, it is clear that the phrase meant the delivery date of May 18. The provisions as to the delivery date and liquidated damage were clearly directed to the matter of having the eggs manufactured, inspected, and ready for delivery on or before May 18, to the end that defendant might carry on its dried-egg program with assurance that it could count on the dried-egg products being ready on the specified date. Plaintiff was thoroughly familiar with the reasons which made this requirement necessary. It is also clear from paragraph 7 that the option given defendant to call for shipment within 10 days after the delivery date of May 18 had no connection with the matter of payment of the stipulated liquidated damage; that option was given, as plaintiff knew, in order to provide defendant with a leeway of 10 days in connection with available storage, packaging and shipping facilities (finding 16).

With reference to plaintiff's contention that it could have delivered and shipped to the FCC other dried eggs which had been inspected and certified prior to May 18, it appears,

as set forth in detail in finding 15, that the other eggs referred to did not belong to plaintiff but had been processed by F. M. Stamper & Co., at Moberly and St. Louis, Mo., and L. D. Schreiber & Co., Inc., at Manning, Iowa, under other contracts with FCC to which contracts such eggs were obligated by the inspection certificates issued thereon and for the fulfillment of which contracts the eggs were being held subject to notice of call. While it may be true that plaintiff was on such terms with those companies that it could have obtained their consent to the transfer of those inspected eggs to apply on plaintiff's May 18 contract, it did not attempt to do so and it could not have done so without defendant's consent and approval. Whether defendant would have approved such transfer does not appear. Such a transfer might have left Stamper & Co., and Schreiber & Co., subject to liquidated damage on their contracts. Since those eggs and inspection certificates were committed to other con-
[fol. 50] tracts the eggs were not available for delivery by plaintiff on May 18 under the contract in suit within the meaning of paragraphs 1 (c) and 7 thereof.

Finally, plaintiff argues that in view of the circumstances the amount collected as liquidated damage was in reality a penalty which the court should refuse to enforce. We find no merit in this contention in view of the facts and circumstances disclosed by the evidence and the express agreement of the parties that the agreed liquidated damage of 10-cents a pound was not a penalty. We can find nothing in the contract or in the evidence which would justify the conclusion that the contract intended that the sum agreed to be paid would be liquidated damages if the eggs were called for on May 18 and were not then inspected and ready and would be a penalty if such eggs were not inspected and ready on that date but not called for prior to issuance of the required inspection certificate. On the contrary the circumstances and the language used by the parties negative such an interpretation of the contract. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 118-122.

Plaintiff is not entitled to recover, and the petition is, therefore, dismissed. It is so ordered.

WHITAKER, *Judge;* and WHALEY, *Chief Justice,* concur.
JONES, *Judge,* dissenting:

There was no delay in the actual delivery of the eggs. It is admitted that plaintiff made prompt delivery of all shipments as requested. There being no delay in the delivery of the product there was no occasion to assess liquidated damages.

Had the Government desired earlier shipment, within the date specified, and had the plaintiff been unable to promptly comply due to any failure to have the eggs, dried, inspected, and ready for shipment, it would have been entirely proper to assess liquidated damages, since the actual damages would have been difficult to establish. No such state of facts is presented here. All deliveries were made without any delay whatever.

Both plaintiff and defendant were operating under great difficulties. Wartime shortages are frequently cruel to both [fol. 51] the producer of the article and the nation that has overwhelming need of the supply. I appreciate the fact that if was necessary for the Government to have a strong protective provision in order to assure that every effort would be made to have the essential supplies ready when needed. But the very strength of the provision calls for a fair interpretation and a just application.

A careful reading of the provisions of the contract takes away all basis of the Government's claim to make a deduction. Paragraph 7 says that "Failure to have specified quantities of eggs inspected and ready for delivery by the date specified in the offer will be cause for invoking the provisions of paragraph 9."

Paragraph 9 provides that "Failure to *deliver* the quantity specified in the contract in accordance with the terms of the announcement" shall be ground for assessing liquidated damages [italics supplied]. Concededly there was neither failure of nor delay in delivery. The facts do not meet the specifications required as a condition to the assessing of liquidated damages. The fact that the Government could have asked for earlier delivery but didn't is not sufficient grounds for penalizing the plaintiff. The case of *United States* v. *Bethlehem Steel Co.,* cited in the court's opinion, is inapplicable since in that case there was delay in delivery.

To construe the contract in such a way as to require plaintiff to have the goods ready for delivery even though the defendant was not ready to accept them, and at the same time permit the defendant to delay taking them or to refuse to take them altogether, putting plaintiff to the expense of storage and possibly loss through spoilage with no obligation on the part of the Government to accept them, would be an extreme interpretation.

Failure to comply with paragraph 7 simply brings paragraph 9 into play. Paragraph 9 governs the assessing of liquidated damages. Its terms limit defendant's right to assess damages to "Failure to deliver" and not to mere failure to have been ready for delivery at a previous time. This seems perfectly clear to me.

[fol. 52] There were no damages. There could have been none until the Government was ready to accept shipment. In the circumstances of this case liquidated damages should not be assessed.

MADDEN, Judge, took no part in the decision of this case.

[fols. 53-54] JUDGMENT OF THE COURT—May 6, 1946

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover.

It is therefore adjudged and ordered that the plaintiff's petition be and the same is hereby dismissed.

[fols. 55-56] PROCEEDINGS AFTER ENTRY OF JUDGMENT

On July 3, 1946, the plaintiff filed a motion for a new trial.

On October 7, 1946, the court entered the following order on said motion:

Order

It is ordered this 7th day of October, 1946, that the plaintiff's motion for new trial be *in* the same is overruled.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 861

ORDER ALLOWING CERTIORARI—Filed March 10, 1947

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Page

Goodell v. *Accumulative Income Corp.*, 185 Minn. 213 14
Irving Trust Co. v. *Perry*, 293 U. S. 307 ..... 4, 13
J. I. Case Threshing Machine Co. v. *Fronk*, 105 Minn. 39 14
Kothe v. *Taylor Trust*, 280 U. S. 224 ..... 4, 12
Sun Printing & Publishing Assn. v. *Moore*, 183 U. S. 642 ..... 4, 13
United States v. *Allegheny*, 322 U. S. 174 12
United States v. *Bethlehem Steel Co.*, 205 U. S. 105 ..... 4, 13
Wise v. *United States*, 249 U. S. 361 ..... 4, 13, 14

OTHER AUTHORITIES CITED

Restatement, Contracts, Sec. 339, p. 552 ..... 4, 14, 15
Williston, Contracts (Rev. ed.), Secs. 776-784 ..... 4, 14, 15
Williston, Sales (2d ed.), Sec. 457 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No. 861

PRIEBE & SONS, INC.,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

PETITION

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered on May 6, 1946 (R. 40), and the Court's order entered on October 7, 1946 (R. 40), denying the petitioner's motion for a new trial.

Statement

The facts, found with substantial accuracy by the Court of Claims (R. 18-32), are briefly these:

The petitioner corporation and the Federal Surplus Commodities Corporation, a United States agency hereinafter